IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: TLI COMMUNICATIONS LLC PATENT LITIGATION	)	
This document relates to ALL member cases	)	MDL No. 1:14md2534 (TSE/JFA)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER AND ENTRY OF JOINT STIPULATION REGARDING THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION

Pursuant to the Court's order dated October 16, 2014 (Dkt. No. 76), Defendants collectively submit this memorandum setting forth their position on the disputed issues relating to the proposed protective order that the parties have simultaneously submitted to the Court.

I. STATEMENT OF FACTS

Plaintiff and Defendants have met and conferred on the handling of electronic discovery and on a proposed protective order. They have reached global resolution on those issues with four exceptions:

1. Whether the proposed protective order should contain an "Acquisition Bar," meaning a limited provision that would prevent individuals who review Defendants' confidential materials from engaging in activities related to the acquisition of patents that cover the technology described in those materials;
2. Whether two of Plaintiff's attorneys, Robert Whitman and Mark Raskin, should have access to documents that are designated "CONFIDENTIAL OUTSIDE COUNSEL ONLY" or higher, in light of their competitive decision-making activity;
3. Whether Plaintiff should be able to automatically make four copies of any printed source code or whether they should, instead, meet and confer with the producing party to discuss need for such copies on a case-by-case basis; and
4. Whether marking source code in a deposition automatically entitles Plaintiff to an additional copy of that code or whether, instead, the parties should meet and confer to discuss this issue on a case-by-case basis.

The parties have discussed each of these issues multiple times but have not reached resolution. A copy of the proposed protective order, with the disputed terms identified, is attached as Exhibit A. A copy of the parties jointly agreed upon stipulation regarding electronic discovery is attached as Exhibit J.

II. ARGUMENT

A. This Court Should Adopt a Patent Acquisition Bar

Defendants' Proposal	Plaintiff's Proposal
Protective Order Section 4: **ACQUISITION BAR** **A.** Any person reviewing or that is informed of the contents of any of a Defendant's Confidential Materials, Confidential Outside Counsel Only Materials or Source Code ("Acquisition Bar Materials") shall not, for a period commencing upon receipt of such information and ending three years following the conclusion of this case (including any appeals) engage in any Acquisition Activity (as defined below), including on behalf of a Party asserting a patent in this case. **B.** Acquisition Activity shall mean any activity related to: (i) the acquisition of patents or patent applications (for any person or entity) relating to recording, communicating, classifying, storing or administering digital images, or the subject matter of the Prosecution Acquisition Bar Materials; or (ii) advising or counseling clients regarding the same.	[No acquisition bar should be included in the protective order.]

Courts have long recognized the need to restrict individuals, including attorneys, who receive another party's confidential technical documents from later assisting in the procurement of patent claims drafted to cover those products. The reason for such restrictions is well-accepted: "'It is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.'" *In re*

Deutsche Bank Trust Co. Americas, 605 F.3d 1373, 1378 (Fed. Cir. 2010) (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)). Thus, notwithstanding general provisions "specifying that designated confidential information may be used only for purposes of the current litigation," and notwithstanding the good faith of all parties and individuals involved, courts have recognized that "there may be circumstances in which even the most rigorous efforts . . . to preserve confidentiality . . . may not prevent inadvertent compromise." *Id.*

These types of provisions are particularly appropriate where a plaintiff will have access to "confidential information and source code" which are aptly referred to as the "crown jewels" of technology companies. *See Buysafe, Inc. v. Google, Inc.*, No. 3:13cv781-HEH, 2014 WL 2468553, at *2 (E.D. Va. June 2, 2014) (internal quotation marks omitted). That is the case here for the so-called "Platform Defendants," which are all high-tech companies from whom Plaintiff is seeking valuable source code and other technical documentation. Accordingly, though "disclosure of confidential[] 'crown jewel' technology to opposing counsel is a burden to which parties must submit," a protective order should be entered that "prevents attorneys from—inadvertently or otherwise—relying on the confidential information when they advise other parties anticipating litigation against [Defendants]." *Catch A Wave Techs., Inc. v. Sirius XM Radio, Inc.*, No. C 12-05791, 2014 WL 9868422, at *1 (N.D. Cal. Aug. 6, 2013).

TLI does not dispute these general principles. Indeed, it has *agreed* with Defendants that a "Prosecution Bar" is appropriate in this case in order to prevent individuals that have seen Defendants' confidential information from *prosecuting* patent claims that might cover technology revealed by that information. *See* Ex. A (Protective Order, Section 3). TLI argues only that such individuals should not also be barred from assisting with the *acquisition* of patents that could be used against Defendants. But the rationale for this additional restriction is the same as for the prosecution bar—just as an individual who has seen Defendants' confidential information should not be able to assist in the drafting and procurement of patents intended to cover the very technology revealed by that confidential information, such an individual should also not be able to assist in the acquisition of patents covering the very same technology. The risk to Defendants is fundamentally the same:

> Counsel for Plaintiff has acquiesced to the imposition of a patent prosecution bar, and, therefore, apparently agrees that there could possibly be a risk of inadvertent disclosure of Defendants' confidential information in the course of representing their client before the PTO. Therefore, it is hard to conceive that there would be little or no risk of inadvertent disclosure when these same attorneys advise their client in matters regarding acquisitions of patents.

E-Contact Techs., LLC v. Apple, Inc., No. 1:11-cv-426, 2012 WL 11924448, at *2 (E.D. Tex. Jun. 19, 2012).

In short, after obtaining access to Defendants' confidential technical documents and source code, it is not reasonable to expect that TLI's counsel or experts will be able to avoid using that information, even inadvertently or subconsciously, if they advise their current or future clients on acquiring patents for use in litigation. Indeed, "it is difficult to envision circumstances in which the *inadvertent* disclosure of highly confidential information would not be a risk about which to be concerned when the issue being discussed is the future acquisition of patents." *Inventor Holdings, LLC, v. Google, Inc.*, No. 14-cv-186, 2014 WL 4369504, at *1 (D. Del. Aug. 27, 2014). For this reason, courts routinely find acquisition bars appropriate and necessary in patent cases. *See, e.g.*, *Inventor Holdings*, 2014 WL 4369504, at *1; *Unwired Planet LLC v. Apple, Inc.*, No. 3:12-CV-00505, 2013 WL 1501489, at *7 (D. Nev. Apr. 11, 2013); *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, Docket Entry 145, at 29-30 (D. Del. Aug. 1, 2012) (attached as Ex. B); *Catch A Wave Techs.*, 2013 WL 9868422, at *1;

E-Contact Techs., LLC, 2012 WL 11924448, at *2; *Hyundai Motor Am. v. Clear With Computers, LLC*, No. 6:08-cv-302, 2009 WL 8657271, at *3 (E.D. Tex. May 11, 2009).

An acquisition bar is particularly justified in cases involving non-practicing entities ("NPEs") like TLI and its parent company, Marathon Patent Group.[1] Such entities do not practice any patented technology, but exist solely to license and litigate over acquired patents, making it all the more likely that they will be focused on acquiring patents that might read on a defendant's confidential technology. *See* 2014 WL 4369504, at *1 (noting plaintiff's status as NPE as a factor in imposing acquisition bar); *Unwired Planet*, 2013 WL 1501489, at *3 (considering that "Unwired's sole reason for existence is to acquire patents and sue companies" in imposing acquisition bar). As this Court is aware, TLI has already filed eighteen lawsuits relating to this patent, and its counsel has stated that it may file more. *See* Joint Agenda at 13 (Dkt. No. 63) ("TLI is evaluating the possibility of filing additional cases . . . ."). Moreover, TLI's owner Marathon Patent Group has, through its subsidiaries Selene Communication Technologies LLC, Cyberfone Systems, LLC, CRFD Research, Inc., and Sampo IP filed at least *thirty-seven* other patent complaints, using the same outside counsel being used in this case, including several against the same Defendants in this case.[2] Absent an acquisition bar, TLI's counsel and experts will have access to confidential and sensitive information through discovery in this case that could, even inadvertently, be used to create a roadmap for future patent acquisitions and licensing demands against one or more of the Defendants, fundamentally undermining the protections that protective orders are supposed to afford.

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[1] TLI's counsel has acknowledged that both TLI and Marathon are non-practicing entities:

> THE COURT: So, in other words, TLI and -- Paramount, is it?
> ATTORNEY WHITMAN: Marathon.
> THE COURT: Marathon are what is referred to, I think not euphemistically, but reasonably, as non-producing entities that enforce patents.
> ATTORNEY WHITMAN: Yes, for the benefit of small inventors.

Hr'g Tr. at 65 (Oct. 16, 2014) (Dkt. No. 75).

[2] *See, e.g.*, Selene Communication Complaints, available at, *http://www.marathonpg.com/selene-communications-complaints/*; Cyberfone Complaints, available at

This risk is especially acute here because TLI's counsel, Messrs. Whitman and Raskin, apparently have held competitive decision-making roles in entities in the business of acquiring patents for assertion, including with respect to *the acquisition of the patent-in-suit, the '295 patent, for assertion against Defendants*. Specifically, on October 21, 2013, TLI acquired the '295 patent from LFT Technologies, LLC ("LFT"). (*See* 10/21/14 Assignment) (attached as Ex. C). Like TLI, LFT appears to have been in the business of acquiring patents for enforcement or other monetization activities against others, as it acquired the '295 patent from Lantiq Deutschland GmbH in July 2013 and a few months later assigned it to TLI. (*See* 7/19/13 Assignment) (attached as Ex. D)[3] The papers that document this transfer were signed by Mr. Whitman, as the Manager of LFT, and Mr. Raskin, as the Manager of Plaintiff TLI. (*See* 7/19/13 Assignment) (attached as Ex. D) (10/21/14 Assignment) (attached as Ex. C). Less than a month later, TLI brought its first lawsuit against Defendants on that patent, listing Messrs. Whitman and Raskin as counsel for TLI. Defendants' concern—that TLI's counsel may engage in further patent acquisitions for litigation purposes after seeing Defendants' confidential information—is

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http://www.marathonpg.com/cyberfone-complaints/, last visited Nov. 12, 2014; CRFD Research Complaints, available at, *http://www.marathonpg.com/crfd-research-complaints/*, last visited Nov. 12, 2014; Sampo IP Complaints, available at, *http://www.marathonpg.com/sampo-ip-complaints/*, last visited Nov. 12, 2014. For additional complaints, see U.S. District Court for the Eastern District of Virginia Case No. 13-601; U.S. District Court for the District of Delaware Case Nos. 14-60, 14-62, 14-63, 14-65, 14-66, 14-67, 14-312, 14-316, 14-375, 14-376, and 14-433; and U.S. District Court for the Eastern District of Texas Case Nos. 14-109, and 14-112.

[3] As discussed below, last week LFT wound down its business. (*See* E-mail of 11/13/14) (attached as Ex. E).

far from hypothetical, making an acquisition bar particularly appropriate in this case. Moreover, the fact that TLI's counsel are refusing voluntarily to accept an acquisition bar strongly suggests that they fully intend to continue acquiring and asserting patents, as they have previously done.

B. This Court Should Prevent Messrs. Whitman and Raskin from Accessing Confidential Outside Counsel Material

Defendants' Proposal	Plaintiff's Proposal
[Messrs. Whitman and Raskin may not view Defendants' CONFIDENTIAL OUTSIDE COUNSEL ONLY or RESTRICTED CONFIDENTIAL - SOURCE CODE material under Section 2.B and 2.C of the Protective Order.]	[Messrs. Whitman and Raskin may view such information as Outside Counsel pursuant to Sections 2.A.6(a), 2.B.2, and 2.C.2(k)(i) of the Protective Order.]

Under federal law, this Court has the power to enter a protective order in such a form as is necessary to protect the confidential information of the parties from disclosure—including an order denying access to such information to a particular lawyer or lawyers. *See, e.g.*, *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1467 (Fed. Cir. 1984). Courts typically deny attorney access after evaluating two factors: first, the extent to which providing the lawyer with access to the opponent's confidential information would raise an unacceptable risk of inadvertent disclosure, and second, the magnitude of the harm that would result from such disclosure, balanced against any possible prejudice that a denial of access would cause to the non-movant's ability to make its case. *See, e.g.*, *id.*; *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992).

In each case, the decision to exclude counsel from discovery requires an assessment of "the risk of inadvertent disclosure." *In re Matsushita Electric Indus. Co. v. United States*, 929 F.2d 1577, 1579 (Fed. Cir. 1994) (quoting *U.S. Steel Corp.*, 730 F.2d at 1468). That risk, in turn, "'must be determined . . . by the facts on a counsel-by-counsel basis.'" *Id.* Although a key inquiry in evaluating that risk involves determining whether the lawyer is involved in his client's "competitive decision-making," this term is simply "shorthand" for broader considerations relevant to assessing the risk of inadvertent disclosure, such as "a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions." *U.S. Steel Corp.*, 730 F.2d at 1468.

"[I]nvolvement in competitive decision-making, while an important consideration, is not necessarily the exclusive one," and proper analysis under *U.S. Steel* involves a "careful and comprehensive inquiry" into the lawyer's "role in the affairs of [his client's] company, his association and relationship with those in the corporate hierarchy who are competitive decision-makers, and any other factor that enhances the risk of inadvertent disclosure." *Autotech Techs. Ltd. P'ship v. AutomationDirect.com, Inc.*, 237 F.R.D. 405, 408 (N.D. Ill. 2006).

1. Messrs. Whitman's and Raskin's Business Activities Present an Unacceptable Risk of Inadvertent Disclosure

The threshold issue is whether Messrs. Whitman's and Raskin's "activities, association, and relationship" with patent assertion entities "are such as to involve counsel's advice and participation in any or all" of such entities' decisions in operating their patent monetization business. *U.S. Steel Corp.*, 730 F.2d at 1468. Given Messrs. Whitman's and Raskin's past business activities, the risk of this involvement appears high. As discussed above, Messrs. Whitman and Raskin were intimately involved in decisions regarding acquiring the '295 patent for the purpose of monetizing it through litigation. Messrs. Whitman and Raskin also held positions as business "managers" of LFT and TLI, two patent acquisition and assertion entities, and are regular counsel for Marathon Patent Group, a company in the business of litigating and licensing patents it acquires. Moreover, it appears from recent public filings that Messrs. Whitman and Raskin may still have an ownership interest in TLI (via common stock in TLI's parent company, Marathon) and a financial interest in this litigation (via a right to 50% of any recovery). (*See* Marathon Patent Group 10-Q (dated 11/12/14) at 15)) (attached as Ex. F)[4]

Defendants raised these concerns with Messrs. Whitman and Raskin and they did not deny any of these facts. (*See* E-mails of 11/16/14, 11/17/14) (attached as Ex. G). Instead, they responded that neither of them is *currently* serving in a competitive decision making role with respect to TLI and the '295 patent, and that "[p]ast activities are not relevant." (*See* E-mails of 11/16/14, 11/17/14) (attached as Ex. G). But these conclusory statements are cold comfort in view of the fact that:

- TLI and the '295 patent were sold less than two months ago—during the pendency of the present litigation—which presumably is when Mr. Raskin stopped acting as a Manger (MPG Press Release) (attached as Ex. H);
- LFT (where Mr. Whitman was a Manager) was wound down only last week, after Defendants raised this issue (*see* E-mails of 11/14/14, 11/13/14, 11/11/14) (attached as Ex. I);
- Messrs Whitman and Raskin appear to have a financial stake in Marathon and this litigation; and
- Messrs. Whitman and Raskin are currently pursuing multiple patent litigations against certain Defendants, as noted above.

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[4] If Messrs. Whitman and Raskin are among the original owners of TLI, then they are not entirely removed from the business of TLI because Marathon Patent Group "(i) agreed to issue 60,000 shares of Common Stock to the sellers of [TLI] ("TLIC Sellers"), (ii) paid the TLIC Sellers $350,000 cash and (iii) agreed to pay the TLIC Sellers a *fifty percent (50%) of the net recoveries . . . that the Company makes with respect to the ['295] patent*." (*See* Marathon Patent Group 10-Q (dated 11/12/14) at 15 (emphasis added) (attached as Ex. F).

Moreover, when, in an effort to resolve this issue, Defendants asked if Messrs. Whitman and Raskin would agree not to advise clients on whether to assert patents against any Defendant for three years after reviewing Defendants' confidential information, they did not (as of the time this brief was finalized) respond. Thus, although Defendants do not doubt that Messrs. Whitman and Raskin currently believe in good faith that they are not "competitive decision-makers," given their past associations, the circumstances of the termination of their roles as Managers, and the lack of assurances about their future intentions, Defendants have insufficient protection against the potential inadvertent use of their "CONFIDENTIAL OUTSIDE COUNSEL ONLY" information, including source code.

The recent nature of Messrs. Whitman and Raskin's activites and the lack of assurances about their future activities make their situation different from the one faced by the court in *PACid Group LLC v. Apple, Inc.*, Case No. 6:09-cv-143, 2010 WL 10094684, at *5 (E.D. Tex. Feb. 19, 2010), a case they have cited in correspondence with Defendants. In that case, the Court allowed a former in-house counsel access to confidential information after finding he had not served in that role in more than three years. *Id.* 2010 WL 10094684, at *5. The situation here, where the relevant activity has at best concluded only in the past months or weeks, is much closer to that in *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, Case No. 6:07-cv-346, 2008 WL 5634214, at *8 (E.D. Tex. Mar. 14, 2008), where the Court denied access to outside counsel who also served as in-house counsel to entities involved in patent acquisition and assertion.

In light of this history, there is a legitimate risk that, even accepting Messrs. Whitman and Raskin's analysis that they are not currently acting as competitive decision makers, they will take on this role again in the future, as they have done in the recent past.[5] Defendants should not have to bear the risk that Messrs. Whitman and Raskin will inadvertently violate the protective order's prohibition against using technical information outside of this case either directly in future patent acquisition and assertion businesses, whether on their own or in connection with their representation of Marathon Patent Group or other NPEs. *In re Papst Licensing, GmbH, Patent Litig.*, 2000 WL 554219, at *3 (E.D. La. 2000) (noting the "untenable position" counsel would face "of having to either refuse his client legal advice on competitive design matters or violate the protective order's prohibition against revealing [protected] technical information." (internal citations and quotations omitted)).

2. Inadvertent Disclosure Would Cause Substantial Harm to Defendants

Even unintentional disclosure or improper use of Defendants' "CONFIDENTIAL OUTSIDE COUNSEL ONLY" would severely harm Defendants, for example, by exposing them as targets for new enforcement efforts or lawsuits by patent assertion entities, like LFT, TLI, and Marathon Patent Group. "CONFIDENTIAL OUTSIDE COUNSEL ONLY" information disclosed in this lawsuit, including Defendants' highly valuable and closely-guarded source code, could easily be used, albeit inadvertently, by Mr. Whitman or Mr. Raskin to assist a patent assertion entity in determining which companies should be sued in another round of infringement cases, or which patents should be acquired for such suits. Messrs. Whitman and Raskin could use confidential information to Defendants' disadvantage (1) as leverage in licensing

[5] This issue, though related, is different than the acquisition bar issue discussed above. For the reasons explained above, an acquisition bar is needed for all experts and counsel at the law firms representing TLI that will have access to Defendants' confidential information and source code. The request to exclude Messrs. Whitman and Raskin is an additional protection that Defendants seek given the individuals' past involvement as competitive decision-makers of NPEs in the business of acquiring and asserting patents.

negotiations or to induce a settlement in existing cases; (2) in deciding the types of patents to acquire; or (3) in identifying particular claims to assert against particular products, where the infringement arguments are the strongest. Such information might also inadvertently infect their advice to patent assertion entity Marathon Patent Group, affiliates of whom they represent in over thirty-five cases.

Defendants have faith that Messrs. Whitman and Raskin would make every effort, in good faith, to abide by the protective order and their ethical obligations, but the inquiry does not focus on good faith. "'Inadvertence . . . is no respecter of its victims,' neither is it a respecter of the integrity of those who fall prey to it (internal citations omitted)." *Autotech Techs.*, 237 F.R.D. at 408. Accordingly, the risk of substantial harm to Defendants is simply too great to allow access to "CONFIDENTIAL OUTSIDE COUNSEL ONLY" materials.

3. The Potential Prejudice to TLI Is Minimal

Although TLI may be inconvenienced by having two of its attorneys screened from "CONFIDENTIAL OUTSIDE COUNSEL ONLY" materials, the risk of harm to Defendants outweighs any such prejudice to TLI. TLI has other attorneys who will have ample opportunity to review all confidential materials. Specifically, Mishcon attorneys Charles Wizenfeld and Eric Berger have already entered appearances in this case, and Philip John Harvey, Brian Farnan, Michael Farnan, and John Post have also appeared for TLI. "[C]ourts have found time and again that requiring a party to rely on its competent outside counsel does not create an undue or unnecessary burden." *ST Sales Tech*, 2008 WL 5634214, at *8 (citing *Brown Bag Software*, 960 F.2d at 1471).

C. Plaintiff Should Not Be Permitted a Default of Four Copies of Source Code

Defendants' Proposal	Plaintiff's Proposal
Protective Order Section 2.C.2(d): . . . . The	**Protective Order Section 2.C.2(d):** . . . . The

Receiving Party may, on a case-by-case basis, request additional copies of any printed pages, and the Producing Party will not unreasonably deny such a request. Should there be any dispute regarding such request, the Parties shall meet and confer in good faith within three (3) business days of such a request to reach a compromise.	Receiving Party may request up to three (3) additional copies of any printed pages, and the Producing Party shall provide such copies.

It is well-accepted—and TLI does not appear to dispute—that Source Code is the "crown jewel" of technology companies like the Platform Defendants and therefore entitled to enhanced protection in discovery. *See, e.g.*, *Buysafe*, 2014 WL 2468553, at *2 (noting Defendant considered source code to be the "crown jewels"); *Seagate Tech. v. STEC, Inc.*, ("Because source code is easily copied and manipulated, and because anyone can read it [], source code is often entitled to special protections."). Notwithstanding that, Defendants are agreeing to provide TLI a significant level of access to their Source Code for purposes of this litigation, including allowing TLI the right to have up to 250 pages of code printed *per* Defendant, which if exercised will mean TLI's outside counsel and experts will have access to thousands of total pages of printed code. TLI, however, wants the right to quadruple automatically the amount of code in its possession by being permitted, by default, to request up the three copies of every page printed. This would mean each Platform Defendant would have 1000 pages of its source code turned over to TLI if this option is exercised. And TLI has made clear that it absolutely *will* exercise this option because it believes that "4 hard copies are needed to make sure at least one copy of source code is available at all times to: 1) source code review/technical analysis consultants; 2) the testifying infringement expert; 3) attorneys working on briefings/pleadings; and 4) attorneys taking depositions." (*See* 11/12/14 E-mail from Berger, Ex. G.) In other words, TLI acknowledges it will insist of four copies of every printed piece of code and that it will distribute them to four separate sets of individuals.

The potential harm to Defendants from this expansion of TLI's access is significant. The more copies of code that are printed and circulating, the more opportunities there are for lapses in security precautions, inadvertent disclosure, and potential misuse. Four copies of code with four separate groups of people means there are four times as many opportunities for a tired expert or overworked attorney to forget to secure valuable code at the end of the day, to put pages of code accidentally in with other papers, or to transfer code without proper protection.

By contrast, Defendants' proposal would allow TLI the access they need to make their case with little burden. Defendants are not disputing that there may be situations where Plaintiff's experts or outside counsel needs multiple copies of particular pages of code of particular Defendants. They simply ask that these issues be raised on a case-by-case basis to avoid automatic and thoughtless dissemination of their valuable code. Defendants' proposal assures that Defendants' counsel—who are all fully aware of their meet and confer obligations—will promptly consider and respond reasonably to any such request, and Plaintiff will have the opportunity to raise any dispute with the Court.

D. Plaintiff Should Not Be Permitted To Use Depositions To Obtain Multiple Source Code Copies

Defendants' Proposal	Plaintiff's Proposal
Protective Order Section 2.C.2(n)(i): At depositions, Parties shall make good faith efforts to avoid marking or writing on copies of Source Code. Should a deponent make marks or write on any printed Source Code during a deposition, the parties shall meet and confer within three (3) days after the deposition to determine whether the Receiving Party should be provided a copy of the printed	**Protective Order Section 2.C.2(n)(i):** Should a deponent make marks or write on any printed Source Code during a deposition, the Producing Party shall take custody of the marked copy of the Source Code following the deposition, maintain it without alteration, and produce a copy of the marked-up Source Code within 24 hours of the deposition, unless additional time is requested by the Producing

Source Code upon which the deponent has made marks or written. While this issue is being resolved, the Producing Party shall maintain the marked copy without alteration.	party, such additional time not to be unreasonably denied by Receiving party.

The issue presented by this dispute is closely related to the dispute over copies discussed above. Defendants do not disagree that there could theoretically be situations in which a deponent usefully marks up code in a deposition in a way that fairness and efficiency dictates the deposing party should have a copy of that markup. Should that arise, Defendants agree to meet and confer promptly and provide such a copy as appropriate. Defendants concern, however, is that the minor or incidental marking of a copy of source code not automatically lead to yet another copy of that code being created and disseminated with all the attendant security risks. Nor do Defendants want a deposition to be used as a vehicle for generating multiple source code copies simply by the deposing party asking a deponent to make such markings. Defendants' proposal—which like its proposal above relies on counsel's well-understood meet-and-confer obligations—properly balances Defendants' concerns with Plaintiff's desire for access to information it legitimately needs.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to enter the proposed protective order accepting Defendants' proposals with respect to the issues in dispute.

Dated: November 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2014, I will electronically file the foregoing DEFENDANTS' MOTION FOR ENTRY OF A PROTECTIVE ORDER AND ENTRY OF JOINT STIPULATION REGARDING THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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